

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA, :

Plaintiff, : Criminal Action No.

v. : 1:16-cr-10094-LTS

ROSS MCLELLAN, :

Defendant. :

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

STATUS CONFERENCE

Tuesday, May 29, 2018  
3:06 p.m.

John J. Moakley United States Courthouse  
Courtroom No. 13  
One Courthouse Way  
Boston, Massachusetts

Rachel M. Lopez, CRR  
Official Court Reporter  
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**A P P E A R A N C E S**

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**P R O C E E D I N G S**

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is May 29th, the case of United States v. McLellan, criminal action 16-10094, will now appear before this Court.

Counsel, please identify themselves for the record.

THE COURT: You may be seated.

MR. FRANK: Stephen Frank and William Johnston for the United States. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WEINBERG: Good afternoon, Your Honor. Martin Weinberg with Rob Goldstein on behalf of Ross McLellan.

THE COURT: And on the phone for State Street, whom do we have?

MR. BUTTS: Good afternoon, Your Honor. This is John Butts from WilmerHale for State Street.

THE COURT: Just one preliminary matter for those of you in the courtroom. I'm not intending today to talk about anything other than this narrow question about State Street and those three lawyers, not even the motions that all of you have, or one of you have pending with respect to those lawyers. Tomorrow we'll talk about all of that. And I know

1     you filed a blizzard of papers yesterday, and so I'm aware of  
2     that.

3             So Mr. Butts, here's the situation. I think you're  
4     generally familiar with the context, but let me just recite  
5     it for my understanding. There are three people, each of  
6     whom is a lawyer, two, as I understand it, in England, one in  
7     the Netherlands. My understanding of the facts are as  
8     follows: That each of those three lawyers work at the  
9     time -- at the relevant time of the allegations of --  
10    concerning this indictment; that each of those three lawyers,  
11    at some period during that time, worked for a law firm that  
12    did work for State -- is that State Street or one of its  
13    affiliates; and that the defendant wishes their testimony at  
14    the trial, thinking that it -- that some of it is admissible,  
15    relevant, and helpful; that the Government doesn't  
16    necessarily agree with the analysis of admissible, relevant  
17    and helpful; and that all three of those lawyers, none are US  
18    citizens, none are -- work any longer for State Street,  
19    either directly as employees or indirectly for -- as part of  
20    their work, their doing work for State Street. It appears  
21    they've moved on to work for other financial companies or  
22    different law firms, or what have you.

23            And my understanding is none of the three are  
24    willing to appear voluntarily for trial, either by coming to  
25    the United States to testify, or, as I made clear the Court's

1 offer, with the assent of the Government and the defense,  
2 that they could sit in their offices in the Netherlands or  
3 England and, at a prearranged time, testify, say, at 3:00  
4 p.m. their time, 9:00 a.m. our time, or something like that,  
5 and we would take them out of order on a prearranged time by  
6 videoconference. I can't imagine, if they had to testify,  
7 their testimony is that long. And we would do that.

8 But my understanding is that none of them will  
9 agree to that.

10 So does that all sound -- are you familiar with all  
11 of that?

12 MR. BUTTS: I am familiar with that, Your Honor.  
13 There's one, just, minor clarification that I'd make.

14 THE COURT: Okay.

15 MR. BUTTS: Which is that you thought that, at the  
16 relevant time, each of them did work for State Street as  
17 outside counsel, and two were -- that's correct as to one.  
18 And as to two of the three, though, they were in-house  
19 counsel.

20 THE COURT: Two were in-house counsel. Okay. So I  
21 have not verified this, but I also assume that none of the  
22 three are members of the bar of this court, which wouldn't  
23 give me subpoena power over them, but would give me a little  
24 something.

25 So the reason that I convened the status conference

1 was this, Mr. Butts, hoping to prevail upon you to prevail  
2 upon them to agree to testify or make themselves available to  
3 testify, subject to the resolutions of any motions here by  
4 videoconference. And the reason I did this is they strike me  
5 as not standing in the shoes of ordinary witnesses, in the  
6 sense, they're not just a fact witness who, like, was walking  
7 down the street one day in London and overheard a  
8 conversation that's relevant to this case and why would they  
9 want to bother, and so forth. But there's several facts that  
10 strike me about these witnesses that seem to me ought make  
11 them willing to testify voluntarily.

12 The first is, they're lawyers. Okay. I understand  
13 they're not lawyers, members -- I understand they're not US  
14 lawyers, but they're lawyers. And they're lawyers in  
15 countries that have similar legal traditions, which is the  
16 belief in the rule of law and that rules and evidence govern  
17 the resolution of cases.

18 They each know something about the events that  
19 transpired here. They had some connection to it. And  
20 they're not, as far as I know, subjects, targets, or  
21 defendants, civilly or criminally, in any of these  
22 proceedings. So it just seems like the right thing to do.

23 That might sound old fashioned, but I think it's  
24 just the right thing to do to offer up their evidence. If  
25 they were in the United States, I would have no compunction

1 in subpoenaing them and compelling them to come here,  
2 subject, then, to resolution of whatever there was about the  
3 admissibility of their evidence.

4 So that's the first reason that I think -- it  
5 strikes me that they ought to testify and that that ought to  
6 carry some weight for them as lawyers who are members of the  
7 legal profession in their respective countries and committed  
8 to the practice of law.

9 The second is that two of them were -- as you point  
10 out, were in-house lawyers for State Street, and so these  
11 concern -- I am confident State Street is interested in  
12 the -- the integrity of the judicial process and truth coming  
13 out, and I assume that it entered into a nonprosecution and  
14 cooperation agreement. This is essentially testimony about  
15 things that they did when they were former employees.

16 While I know that there are difficulties sometimes  
17 getting former employees to cooperate with -- you know, about  
18 matters, and the like, but ordinarily, I would think there's  
19 some loyalty, especially by lawyers to their -- and there may  
20 be duties; I don't know what the rules are in those  
21 countries. But in this country, there might be a duty for a  
22 lawyer to sort of provide assistance to their client and  
23 provide information to their client, if wanted. And here the  
24 burden on them seems rather low. So that's a second reason,  
25 it seems to me, I would think they would be willing to make

1 themselves, or ought make themselves available.

2 And the third, I would think, as a general matter,  
3 it would be State Street would want them to make themselves  
4 available, because it would want to do whatever it could to  
5 be sure that this proceeding was one and done. And it has  
6 its -- not only does it have its non -- deferral, or  
7 whatever, the agreement with the Government, in cooperation  
8 with the Government, but as a general matter, we all -- we --  
9 maybe Mr. Weinberg feels differently, but I think the rest of  
10 us would all like to do this once well and be done. And it  
11 may be in Mr. Weinberg's interest to repeat, to have a  
12 do-over, depending on how it all went the first time. But I  
13 would think State Street would have that interest.

14 And like certainly one issue in this case, it might  
15 not be a big issue when it's all said and done, but it might  
16 be an issue, is the fact that there are witnesses who are  
17 overseas who aren't subject to the subpoena power and what  
18 the significance of that is. And so if those people testify,  
19 then that's not an issue, or it's not an issue as to them.

20 And so those are all lots of reasons that I can  
21 think of that it would be preferable if these witnesses made  
22 themselves available. Everybody here is agreeable to let  
23 them testify by videoconference at a stipulated time. So  
24 that, you know, minimizes -- they don't have to come here.  
25 We can do it at a certain time. There's a lot that -- you



1 know, that eases the burden on them.

2 So I had this status conference because I wanted to  
3 tell all those things to you, in the belief that somehow I  
4 might be persuasive upon you, and you might then be  
5 persuasive upon them.

6 MR. BUTTS: Thank you, Your Honor. So I've been  
7 taking good notes about what you said, and I will relay that.  
8 I would also say, I have been in touch with at least the two  
9 former State Street lawyers, and they did appear in the UK  
10 when they were deposed --

11 THE COURT: Right.

12 MR. BUTTS: -- just in the SEC case. And so you  
13 know, I have been in touch with them about this and offered  
14 to represent them, so they would be, you know, with counsel,  
15 without charge, and obviously make, you know, facilities  
16 available for the videoconference. And you know, both of  
17 them were quite strong in their answer that they were not  
18 interested in that, and one, as recently as Friday, was very,  
19 very strong. But I will relay what you said.

20 I'm not optimistic that they will change their  
21 mind. They are, as you mentioned, former employees with, you  
22 know, no ongoing obligations to State Street vis-à-vis any  
23 employment relationship. The third lawyer, who is the one in  
24 the Netherlands, is a former associate of one of State  
25 Street's outside counsel. She -- that firm has been

1 representing her, and as such, I don't have a direct line to  
2 her. But I spoke to her lawyer on Friday, in anticipation of  
3 this conference, and he told me that she had thought through  
4 it carefully and made her decision. I'll relay these  
5 comments to him.

6 I don't know what her current status is, but I know  
7 that she was scheduled to have a baby only a few weeks ago.  
8 And god willing everything went well and she's at home with,  
9 you know, a two-week or three-week old infant. And I don't  
10 know if that's weighing on her decision, as well. But you  
11 know, I have passed on the sentiments that you shared  
12 earlier. I'm willing to do it again.

13 THE COURT: Thank you. I guess I would say just a  
14 couple more things. One, obviously, you know, I appreciate  
15 that if she's home with a two-week-old baby, testifying in a  
16 foreign criminal proceeding of which she's, at most,  
17 peripherally involved as a fact witness, would probably be  
18 low on her list of considerations, to the extent that she  
19 even remembers at the moment this case. On the other hand,  
20 we would be talking about testimony -- this is during the  
21 defense case, so it's coming later in June. That gives her a  
22 little more window of time. It's not huge, I recognize, but  
23 it's something. I'm happy to be as accommodating as we can  
24 be about the time. You might -- I don't sense it's the  
25 longest amount of testimony.

1           How long, if you got everything you wanted from  
2           that witness, would it be, Mr. Weinberg, on direct?

3           MR. WEINBERG: 30 to 45 minutes.

4           THE COURT: So it would probably be an hour, total,  
5           at the most?

6           So I understand that that's -- if she's home with  
7           the baby, it could be inconvenient. But nonetheless, I think  
8           the other considerations I mentioned apply.

9           And there is another, I suppose, further  
10          consideration you can think about, which is that, you know,  
11          at some point -- there's various motions before me now, and  
12          depending on the outcome of the case, there could be other  
13          motions, and some of them implicate that Mr. Weinberg is  
14          raising this question about foreign evidence and  
15          availability, and the like. And so I've written a little bit  
16          on that already, I think, in some orders, but I might or  
17          might not have to write more about that at the time it comes  
18          or at different points related to either pending motions or  
19          later.

20          And so I would think about that and certainly -- I  
21          don't -- the only reason that I heard about why they wouldn't  
22          want to testify is the one you mentioned. I understand that  
23          reason. And especially I understand that reason if we were  
24          having trial this week. But other than that, I don't know.  
25          You know, people sat for a civil deposition, I don't know why

1 they wouldn't be willing to sit for another. I get that I  
2 can't compel them to, but it would be nice if they  
3 cooperated.

4 MR. BUTTS: Understood, Your Honor. They -- you  
5 know, they did testify in the civil deposition, and you know,  
6 I don't know that this is driving, necessarily, the ultimate  
7 thing in their decision-making, but there was some concern on  
8 their part about characterizations made of their testimony in  
9 one of Mr. Weinberg's papers and, you know, suggesting that  
10 they were more knowing or more knowledgeable about what  
11 Mr. McLellan was alleged to have been doing than they really  
12 were. And they were quite categorical in their testimony in  
13 the case they were noticed for.

14 THE COURT: All the more reason, one would think,  
15 that they would like the chance to be the oracle of their  
16 views as to what they did and didn't know at the trial, to  
17 the extent they're asked. I mean -- and one of the virtues  
18 of testimony at trial, of course, is there are judges to  
19 enforce the rules, unlike at depositions. And I understand  
20 that they don't like the way -- but they're -- but I guess,  
21 as you know, they're going to be characterized in pleadings  
22 whether they testify at the trial or not.

23 If they don't testify at the trial and Mr. Weinberg  
24 is going to characterize them in pleadings, then the  
25 Government will characterize them probably differently, but

1 characterize their view of the testimony and pleadings, and  
2 I'll characterize what -- I have the transcripts. I'll  
3 characterize the testimony as I -- to the extent I think it  
4 needs to be characterized, in whatever way I see fit, to the  
5 extent I need to write about it, to the extent I write an  
6 opinion discussing their decisions not to testify. If they  
7 testify, it will speak for itself to the jury.

8 MR. BUTTS: Your Honor, I understand all of that,  
9 and I will, as I say, be happy to talk to them again. This  
10 conversation that you're anticipating is not unlike what  
11 we've previously talked about. But I'll relay that it came  
12 from you, and that may cause them to think about it  
13 differently. I don't know, but I will be happy to do that.  
14 And obviously, in the case of Ms. Lewis, it will be a  
15 conversation with her lawyer.

16 THE COURT: Sure. You can convey to them, I  
17 scheduled a very special status conference just for this  
18 purpose, just so I could communicate this to you. That was  
19 my entire purpose. That was the only purpose for today's  
20 hearing. And I invited the parties to comment on whether I  
21 should do this, and neither objected. And so that's where it  
22 stands.

23 Is there anything else from -- -- I don't have  
24 anything else, Mr. Butts, unless you have something else you  
25 want to address with respect to this.

1 MR. BUTTS: I have something I would like to ask,  
2 not with respect to this, but with respect to a motion to  
3 compel that we're scheduled to respond to today.

4 THE COURT: Oh. Yes. Go ahead.

5 MR. BUTTS: Which is only that there was a -- that  
6 motion, just for your recollection, was filed ex parte or --

7 THE COURT: So part of it was ex parte, and I  
8 ordered that it all be served on you, so you could understand  
9 what the -- the whole thing. And then Mr. Weinberg asked me  
10 to say, "Well, yes, but you can't share the ex parte parts  
11 with the Government," and I said okay to that.

12 MR. BUTTS: That's right. And so my question is,  
13 with regard to the opposition that we'll be filing today, I  
14 don't think that it reveals anything that was in the ex parte  
15 portions of that, and we wrote it to take out the name of the  
16 client so that it wouldn't need to be filed under seal. But  
17 I obviously don't want to offend any order expectations that  
18 you have.

19 THE COURT: I don't have any. My -- you hit the  
20 two expectations that I had. If you referred to the ex parte  
21 things, then I would want you to redact those parts and file  
22 a redacted public copy and a sealed unredacted. If you're  
23 not -- if we're not -- I guess we're not referring to the  
24 name of the insurance company in pleadings at the moment,  
25 right?

1 MR. FRANK: Not for --

2 MR. BUTTS: I can refer to it the same way as  
3 the --

4 THE COURT: Fine. If you did it the same way, then  
5 that's fine. So I don't -- if you have any concern about  
6 something running up against the ex parte, you can run it by  
7 Mr. Weinberg or Mr. Goldstein and see. But other than that,  
8 I'm not only perfectly content that you file it not under  
9 seal, but I appreciate that you made an effort to advance  
10 your client's positions fully and effectively, without having  
11 to file it under seal. It just makes everything easier.

12 MR. BUTTS: Okay. Thank you, Your Honor. There  
13 will be one -- there will be a small piece that's within an  
14 exhibit that refers to the client's name that will be  
15 redacted. But I think for all purposes --

16 THE COURT: Hold on one second. Is there any  
17 reason that the client's name needs to be redacted at this  
18 point, Mr. Frank? Should he redact it from the --

19 MR. FRANK: Your Honor, under Justice Department  
20 policy, victims aren't supposed to be identified until they  
21 need to be identified. At this point, we're four days away  
22 from trial. I don't think it makes a big deal, but -- or  
23 five days. But technically, our policy is not to identify.

24 THE COURT: Not to identify until they're literally  
25 called on the witness stand or something like --

1 MR. FRANK: Or need to be identified in court, yes.

2 MR. BUTTS: I mean, it's already redacted.

3 THE COURT: Fine.

4 MR. BUTTS: We can do that as long as it doesn't  
5 bother anyone.

6 THE COURT: It's not going to bother anybody, I  
7 don't think.

8 It's not going to bother you, is it?

9 MR. WEINBERG: Not going to bother me. But I do  
10 think that at some appropriate time, on or before June 4, we  
11 ought to be --

12 THE COURT: I think on June 4th they have to be  
13 revealed, because we have to reveal them to the venire.

14 MR. FRANK: We agree, Your Honor.

15 THE COURT: Right. Okay. All right, nothing else  
16 with Mr. Butts.

17 Any of you have anything else on this issue.

18 MR. FRANK: Your Honor, I just want to clarify the  
19 record on one point. And I realize we're not arguing  
20 motions, I'm not trying to argue motions, but there were some  
21 representations made in the defense's motions yesterday that  
22 the Government has done nothing to accommodate defense  
23 requests for foreign witnesses and foreign documents, and  
24 that is categorically untrue, Your Honor.

25 We have stopped short of exercising the



1 Government's rights under the Mutual Legal Assistance Treaty,  
2 because we've been advised by our Office of International  
3 Affairs that that's prohibited. We have made some pretty  
4 extraordinary efforts to reach out to parties overseas, to  
5 expedite -- to ask them for the production of documents, to  
6 expedite the production of documents, which I believe were at  
7 least, in the case of the City of London police, successful,  
8 and to speak to these particular witnesses and their counsel,  
9 through their counsel, to see if they would be willing to  
10 testify.

11 We've even reached out, at Mr. Weinberg's request,  
12 to authorities in Ireland, which the Court hadn't even  
13 mentioned. I did that at Mr. Weinberg's request, to see if  
14 there would be any progress on that front. So I just wanted  
15 to clarify the record, because to the extent there are  
16 proceedings down the line and to the extent it's relevant to  
17 the Court's consideration, we really have tried. We've had a  
18 little bit of success, but not as much success as might be  
19 hoped.

20 THE COURT: Just for the record, I didn't convene  
21 this hearing based on a conclusion that I needed to do --  
22 that you didn't do it, and therefore, I needed to do it. I  
23 convened this hearing because they're not coming, these three  
24 people. And I thought that -- I was hopeful that, as lawyers  
25 presumably committed to the, you know, expeditious and proper

1 administration of justice, these people who aren't subjects,  
2 targets, or defendants, might be prepared to voluntarily offer  
3 their testimony in a way and mechanism that we've all  
4 arranged that would be convenient for them and that it  
5 would -- that there are some --

6 That while usually the entreaties of the executive  
7 branch carry great weight, sometimes the entreaty from the  
8 judge makes a difference. And I thought I would, because I  
9 think that it would be certainly -- it would facilitate  
10 resolution of some issues if they were available.

11 MR. FRANK: Understood, Your Honor. And we don't  
12 quarrel with any of that. But to the extent there was a  
13 representation in the record of the Court that we haven't  
14 done anything, I very currently wanted to state that we have.

15 THE COURT: And at the moment, I don't need to make  
16 any findings about that.

17 MR. WEINBERG: And I don't recall the exact  
18 language that is triggering Mr. Frank's reaction, but I would  
19 say, from the perspective of the defendant, one, the  
20 Government opposed these very Rule 15 depositions. And the  
21 record shows, in the civil case, they were ordered by Judge  
22 Woodlock on March 17th. And by May, Freshfields, that is,  
23 not WilmerHale, but it's the British lawyers for State  
24 Street, were communicating. In June, the home office of the  
25 UK, less than 90 days --

1           THE COURT: Tell you what. At the moment, let's  
2 not go through all of these representations and views of each  
3 thing, because it's not relevant to Mr. Butts' time and it's  
4 not relevant to the issue that we have here. To the extent  
5 we need to get it, I'm not making any rulings about that.  
6 Tomorrow we'll be going through the motions in limine, the  
7 preliminary voir dire.

8           Did each of you, either of you, give me a  
9 statement, a proposed statement to describe the case?

10          MR. FRANK: We did not, Your Honor. We can.

11          THE COURT: I think that you should think about  
12 doing that. I've been working on one myself, but I feel like  
13 they need some explanation -- in my experience, explaining  
14 the case in a neutral way, both what -- what the Government's  
15 case is and a little bit of the defense -- it may just be he  
16 denies it. You may want to say a little more. But then it  
17 gives them some context to answer the questions, and it  
18 helps. Not like pages. Typically what I would read, you  
19 know, in a simple criminal case, it might just be two or  
20 three sentences. There was a car stopped, they found a gun,  
21 he's charged being a felon in possession of a firearm, and he  
22 denies the charges. They have a context to answer the  
23 questions.

24          A little bit more here, not more than -- I tried a  
25 patent case earlier this month with a somewhat complicated

1 set of issues, also had an international dimension to it.  
2 And maybe I had two single-spaced paragraphs, or three, just  
3 describing the case, because I think that's really helpful to  
4 the venire to -- then when they hear names, they mean  
5 something more to them. And then when they hear the  
6 questions about the law and the different questions about the  
7 case, and the like, they have a little context to answer the  
8 questions a little easier -- you get better answers, I guess,  
9 is what I'm saying.

10 So if you submit something, that's great, because  
11 then I'll look at that. Otherwise, I'll draft something and  
12 read it back to all of you. But you might prefer to do it  
13 together or give me some submission.

14 MR. FRANK: We're happy to do that, Your Honor. I  
15 just wanted to clarify, is it tomorrow? My calendar shows  
16 Thursday.

17 THE COURT: I can't remember now.

18 THE DEPUTY CLERK: We have it on for 2 o'clock,  
19 Wednesday, the 30th.

20 THE COURT: Let me just see one thing.

21 MR. FRANK: There were two separate -- there were  
22 actually two separate orders, I believe. The second order  
23 was for Thursday?

24 THE COURT: I'm available at 2:00 tomorrow and 2:00  
25 on Thursday. I'm happy to meet -- it may be we may need to

1 meet twice. There's a lot of motions.

2 Are you both available tomorrow?

3 MR. WEINBERG: Yes, Your Honor.

4 THE COURT: Why don't we -- tomorrow, we meet from,  
5 at most, 2:00 to 3:30, because I have something else at 4:00.  
6 So why don't we, if you're available, let's start tomorrow at  
7 2 o'clock, because you filed a lot of motions. I've read  
8 everything that you filed. But you both have done a really  
9 nice job at presenting the issues. The good part about that  
10 is you're doing a really nice job. The bad part is it makes  
11 my job really hard and -- so then if we go through them,  
12 we'll do that. If we're done with everything, great, we're  
13 done on Wednesday. It might be better for you. But if we're  
14 not, then we can talk again on Thursday.

15 MR. WEINBERG: Thank you, Your Honor.

16 Judge, at some point, can you just remind us what  
17 the Court's jury selection practice is?

18 THE COURT: Yes. I'll tell you briefly right now.

19 So we will bring the venire in. I will -- they'll  
20 be sitting in the audience. Juror number one, listed on  
21 the -- you know the sheet you get, one to whatever? Juror  
22 number one will be to my left, in the first row.

23 Mr. Butts, you can stay for this. But if you want  
24 to hang up, if you haven't already hung up, you are free to  
25 do so.

1 MR. BUTTS: Thank you, Your Honor. I will leave  
2 you all. Thank you.

3 THE COURT: All right. Bye.

4 (Mr. Butts leaves the conference call.)

5 THE COURT: Juror number one, in the first row to  
6 my far left. Across, I guess, would be four, eight, 16, 20.  
7 Groups of four. I think they put four in each bench. And  
8 then the second row would be 21 across, third row like that.

9 I will then ask a series -- I will ask some  
10 amalgamation of the questions that all of you propose. We  
11 can go over that tomorrow. And I'll ask, basically,  
12 questions where they'll raise their hand with a "yes," and  
13 raising their hand would be an answer that would suggest to  
14 me further inquiry is required.

15 For each question, "Do you know the lawyers" -- and  
16 then whoever raised their hand, we'd ask them for their juror  
17 number and we would write down their number, number one,  
18 juror number ten, what have you. And we go through question  
19 one, two, three until I've asked all the questions of the  
20 venire.

21 And then I would bring, starting with the juror  
22 number one, and, "Did you raise your hand?" If they raised  
23 their hand, I'd bring them over to sidebar with all of you.

24 You can have your client there or not, as you  
25 prefer. You do whatever you want as to that.

1 I will ask the juror -- potential juror follow-up  
2 questions about the one or more questions to which they  
3 raised their hand. And then when I'm done with that, I'll  
4 turn to each of you, "Do you have any follow-up questions?"  
5 So if want to follow-up on those issues, you may. It's no --  
6 so in that sense, yes. It's not license to ask about -- they  
7 didn't raise their hand to the law enforcement question and  
8 you want to say, "Well, what do you think of law enforcement  
9 and FBI agents and," no, because that's far afield. If  
10 something were missing on the form that you got from the jury  
11 office, that would be not within what I asked about, but I  
12 wouldn't mind that. But beyond that, not really. No.

13 Then I will send the person off. And then that's  
14 the moment we'll have our discussion about for-cause  
15 excusals.

16 So here's how it typically breaks out. There's  
17 some people who I'm going to excuse for scheduling reasons,  
18 and I'll just -- I'll say to you, "Do you have any objection  
19 to that?" Just as to this person. Some people I might defer  
20 on. I might say I'm thinking about excusing them for  
21 scheduling reasons, but I kind of want to see how we do, how  
22 many we have. So they're a question mark as to an excuse.  
23 But the ones that I'm excusing for scheduling, I'm not  
24 telling them at that moment. I'm sending them back to their  
25 seat, but I'm not sending them downstairs, mostly because I

1 don't want to create a rush to downstairs and sometimes I  
2 want to think about that.

3 So anyway, I'll say that to you. I'm very  
4 transparent about my thinking about the scheduling. And then  
5 if you want to excuse the person for cause, because they said  
6 they never met a law enforcement agent that -- who didn't  
7 stand true, or because he was indicted he must be guilty, or  
8 what have you, whatever the reason you want to advance,  
9 that's the time. Make your for-cause objection before I get  
10 to the next juror.

11 And the reason that I want to resolve it then is  
12 for several reasons. It's fresh in my mind, your objection.  
13 And whatever response I get from the Government, or vice  
14 versa, might cause me to think I want to talk to the person  
15 some more, so I'll call them back. And that's a very  
16 convenient time to call them back.

17 You can wait until they're out of -- until they're  
18 back a little ways, so you don't have to do it sort of within  
19 earshot of them. That's fine with me. And then we'll have  
20 our discussion and then I'll resolve it. And usually I'll  
21 resolve it right then, or I'll call them back, talk to them.  
22 And we'll have another discussion, and then I'll resolve it.

23 Sometimes I'll wait and say I want to think about  
24 that one, and there will be a question mark. And we'll -- so  
25 we'll keep going and I haven't ruled on it, and you'll get



1 the chance to hear from me again about it.

2 So I'll go like that until we've cleared enough  
3 jurors. When we've -- until we've cleared enough jurors plus  
4 one or two extra. And when I say "cleared enough," we're  
5 going to have 12 in the box, plus how many alternates?

6 Did we talk about how many alternates.

7 MR. FRANK: I don't think we did, Your Honor. We  
8 would suggest, and based on my last trial experience strongly  
9 suggest, that we have more than two, given the length of this  
10 trial.

11 THE COURT: I think we should have more than two.  
12 I think four is enough.

13 MR. FRANK: I think that's probably enough.

14 MR. WEINBERG: Sure.

15 THE COURT: All right. So we'll do 16. So then 16  
16 plus -- you get 10, Mr. Weinberg?

17 MR. WEINBERG: I do.

18 THE COURT: So that's 26, plus you get six for the  
19 Government, I think?

20 MR. WEINBERG: I think we get a few extra for  
21 alternates on top of that.

22 THE COURT: Right, before -- we'll get to that in a  
23 minute. So you get one for each two alternates. So you  
24 would have - so in total, you get 12, plus 16 jurors is 28,  
25 plus you have 6 plus 2 is 8, so that's 36. So we need to

1 clear 37 or 38 jurors to have enough. So when I get to 37 or  
2 38, then I'll stop and I won't call up to sidebar anyone  
3 else. And if we get to 37 or 38, you know, but there's one  
4 or two who are in the first group, who we've gone over and I  
5 reserved on, I'll resolve that with you then and we'll talk  
6 about it and whatever it would be.

7 Once I have cleared 37 or 38 jurors, then -- and  
8 here's a question for you. It's a choice. The rules suggest  
9 that you should do two steps, first the jury, and then the  
10 alternates. That's the way I would do it, unless both of you  
11 agree to do it as one selection. So I'll tell you how I do  
12 it, and you can think about it and you can tell me tomorrow.

13 If we do it the way it's literally prescribed in  
14 the rule, I would seat 12 in the box. I will ask each juror  
15 in the box to say their name, their occupation, what they're  
16 spouse, significant other, partner, or similar person, if  
17 there is one, does for work, what they do for work. So we  
18 hear from the person. We go down the line of all 12, and  
19 then I'll say, okay, let's go. The first round, Government  
20 goes first, the defense goes second, go back and forth, one  
21 strike at a time -- I'm sorry, one strike for the Government,  
22 two strikes for the defense, back and forth like this. It  
23 will become one and one, if you reach the point that you're  
24 even and striking people in the 12.

25 Once you're done striking people in the 12, then

1 let's say you struck three people out of the 12. Those three  
2 people, I'll send down to the jury room -- by the way, before  
3 I seat the 12, I'll send everybody down I've excused for  
4 cause or scheduling. So you're only looking out at the  
5 cleared people. And then I'll excuse the three you struck  
6 from the box.

7 Now, we'll have -- I'll bring three new people in,  
8 which will be the next three in order, sequentially. And the  
9 three I put in, I'll ask them the same question about work,  
10 and the like. Then it's round two. Round two, defense goes  
11 first, Government second. And -- but you're only striking  
12 those three people. So once you're settled with the people  
13 in the box and you didn't strike them and you're done with  
14 the back and forth, you know, if Mr. Frank says, "Well, I'm  
15 only striking one person," you can go as long as you want,  
16 but once you say you're done, whoever is left in the box is  
17 on the jury. So we would do that until we're done with the  
18 12, until we have 12.

19 Then we go to the alternates. And I'd seat four  
20 alternates, ask them the same question, then we go and start  
21 with the Government, back and forth, one, one, one, one. And  
22 then we do another round, switch in the second round and you  
23 start. That's if we do them separately.

24 If we combined them as one pick, then I would seat  
25 the 16 people at the same time, and you could strike anybody

1 you wanted. And then the -- I have to think about it. I  
2 would be open to your suggestions. Probably what I would do  
3 is the people in the four seats furthest from me, two in the  
4 last row, two in the front row, would be the alternates. And  
5 that's the way I've done it the one or two times people have  
6 agreed to do it as a unitary process.

7 MR. FRANK: And in that case, Your Honor, we would  
8 just go back and forth among the 16 until we'd exhausted our  
9 strikes?

10 THE COURT: Correct. Yes.

11 MR. FRANK: And is it Your Honor's practice to tell  
12 the alternates that they're alternates?

13 THE COURT: No. Unless you see some reason that I  
14 should. Ordinarily, I wouldn't tell them now, because I  
15 don't really know now. They're seemingly alternates now, but  
16 they might not actually be alternates, because somebody could  
17 get sick, you know, we could lose someone. So I wouldn't  
18 tell people now that they're alternates. I would go all the  
19 way to the end, until we're ready to send them out to  
20 deliberate, and then whoever is actually an alternate, I  
21 would deal with them.

22 MR. WEINBERG: Judge, just to be clear about one  
23 thing, like we line up one through 20, and let's say 12 are  
24 the jury. And if any are challenged for peremptories, you  
25 would then have the next person, the next person --

1 THE COURT: Let's suppose everybody came in, no one  
2 answered yes to any questions, there was no scheduling  
3 issues, no for cause. It was my dream. The first 12 jurors  
4 would be in the box, one to 12 on your list. Mr. Frank  
5 struck two and you struck two. So I would excuse those  
6 people, send them on their way. Round two would come. I'd  
7 fill their four empty seats with jurors 13, 14, 15, 16, if  
8 we're just doing the 12 now. And in round 2, you could only  
9 challenge those four people wherever they sat.

10 MR. WEINBERG: So in other words, the randomness is  
11 done when they line jurors up.

12 THE COURT: Yes. I don't do anymore with the  
13 randomness once they're in here.

14 MR. WEINBERG: Okay.

15 THE COURT: Right. It's just going through the  
16 line. So in that sense, the person at the end, like the 67th  
17 juror -- we probably won't have 67, but the last one on your  
18 list we might get to, because, you know, there could be a lot  
19 of scheduling issues in this case. I think three to four  
20 weeks, it's -- encompasses the end of school, public school,  
21 and the beginning of summer vacation, so there may be a fair  
22 number of people who are going away on vacation June 18th or  
23 June 25th, you know, end of school, public school, if they  
24 have kids. Maybe not. It's a lot of snow days, maybe school  
25 is pushed out. That might help you out. But it's a long

1 time, and there are more schedules.

2 MR. FRANK: I'm sorry, I just got confused. So the  
3 alternate plan -- the two options are three at a time, we do  
4 what we do, and then you bring up another three and those --

5 THE COURT: No, no. Two options. Option one is 12  
6 jurors, we pick the jury. When we're done picking the jury,  
7 we pick four more, in which case your challenges for the  
8 alternates you do separately. And we pick them -- we pick  
9 12, and when we're all done with 12, then we pick four. And  
10 you have separate groups of strikes for the two groups.

11 MR. FRANK: Understood. But the mechanism for  
12 picking those is you bring three up at a time?

13 THE COURT: No. I bring 12 up -- if I'm doing the  
14 two step, jurors and then alternates, I bring 12 up. Your  
15 first round, you strike one, he strikes one or two. If he  
16 only strikes one, that means he's done. You go, you will say  
17 "I'm content," or you strike another. And you go back and  
18 forth among the 12 until you've exhausted yourself with those  
19 12. You're either out of strikes, or you're content with who  
20 hasn't been struck. And the same for him.

21 Once you're both done like that, I excuse the  
22 people you've struck. That could be three jurors, it could  
23 be one juror, it could be all 12. But whoever is left, if  
24 anyone is left in the box, they're going to be on the jury  
25 because then in the second round, no back-strikes. You

1       can't strike them.

2               MR. FRANK: And the only difference between that  
3       and calling up 16 is that it's just all in one.

4               THE COURT: Correct. You're combining your  
5       alternates. And there must be some strategic significance  
6       for how it works out with the pool that I confess eludes me.  
7       It's a little simpler, from my perspective, to just put 16 in  
8       the box and do it once. But I think the way I read the rule  
9       is it prescribes it the other way. So I'm not prepared to do  
10      it as a one-step process unless you both agree.

11              MR. FRANK: So when Your Honor said something about  
12      three at a time, that was three strikes at a time, his two  
13      and my one?

14              THE COURT: Yes, just by way of example, if there  
15      were three strikes. Correct. Not that there's some --

16              MR. FRANK: You would go back and forth until both  
17      of us say we're done, and then you would fill in the new  
18      spots. And then we only focus on the new spots.

19              THE COURT: Correct.

20              MR. FRANK: Got it. Thank you, Your Honor.

21              MR. WEINBERG: Judge, I could tell you, we prefer  
22      the 10 and 6 for the 12 and then the 2/2 for the alternates.

23              THE COURT: You'd prefer to do it in two rounds.

24              MR. WEINBERG: We like 10 to 6 better than 12 to 8  
25      in terms of --

1 THE COURT: Oh, I see. So you want to pick the  
2 jury and then pick the alternates.

3 MR. WEINBERG: That's the way I --

4 THE COURT: Okay. I think that's what the rule  
5 prescribes, and so then that's the way we'll do it. Okay.

6 MR. WEINBERG: Last question, Your Honor. Should I  
7 assume that even if we pick the jury on Monday before the end  
8 of the day, we would do openings on Tuesday? Or should we be  
9 ready to do openings?

10 THE COURT: I think you should be ready to do  
11 openings on Monday, simply because this is a long trial.  
12 We're losing one day because of the Court's conference, so  
13 I'd rather keep pressing. I certainly would not expect  
14 witnesses in the afternoon. If we -- if we pick the jury by  
15 10:00, I would want to go to openings and then go to  
16 witnesses. I find it hard to believe that all of that will  
17 happen before 1 o'clock, in which case I would think about  
18 openings in the afternoon and think about maybe not. But I  
19 think, at the moment, you should think about being ready.  
20 And we could talk about that some more tomorrow.

21 MR. WEINBERG: Last question. Would Your Honor  
22 impose on the Government to at least tell us who their first  
23 witnesses are so we can be ready --

24 THE COURT: I will tell you both this, that's  
25 apropos that. And then we can go, and we'll talk more about



1 this tomorrow. But I want to meet -- other than -- Monday we  
2 can meet at 9:00. But after that, I want to meet at 8:30  
3 every day, because I want to review whatever evidentiary  
4 issues you anticipate arising during the trial. I'd rather  
5 you bring them up, even if I can't resolve them at 8:30. You  
6 preview them, I can hear your arguments, I'm familiar with  
7 them. Then I can -- I have -- that gives me my best chance  
8 to be able to resolve the evidentiary issues without a  
9 sidebar, which is my goal. The jurors don't like sidebars,  
10 and I'd like to spend the juror's time, that they give us  
11 from 9:00 to 1:00, hearing testimony.

12 So yes, I would like you to tell him in advance,  
13 you know, like whatever you work out that's reasonable and  
14 fair to you and fair to them, of who's coming up day to day,  
15 so that at 8:30 in the morning, we can make use of that time.  
16 So my goal is to talk about those evidentiary issues.

17 I've done this in civil cases, I've done it in  
18 criminal cases. I stole the idea from one of my colleagues.  
19 And I found that although it's a bit taxing, it -- in terms  
20 of time, I find it very helpful. And it means that often we  
21 don't have to have sidebars, and when we do, they're more  
22 abbreviated. So that's what I want to do.

23 So yes, you don't have to tell them today,  
24 necessarily, who's the first witness, but tell them. And I'd  
25 want you to tell them along the way. I would think you could

1 work that out. Tell them a day or two days in advance of  
2 who's coming up.

3 And then when it's your case, you should do it the  
4 same.

5 MR. WEINBERG: Of course.

6 THE COURT: I think that facilitates this focusing  
7 and bringing up the evidentiary issues and then trying to  
8 resolve them so that -- and that makes the 9:00 to 1:00 work  
9 better in terms of you get more done during the 9:00 to 1:00.

10 Okay. Great. I'll see you tomorrow at 2 o'clock.  
11 Have a good day.

12 THE DEPUTY CLERK: All rise. This matter is  
13 adjourned.

14 (Court in recess at 3:49 p.m.)  
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**CERTIFICATE OF OFFICIAL REPORTER**

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 7th day of January, 2019.

/s/ RACHEL M. LOPEZ

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Rachel M. Lopez, CRR  
Official Court Reporter